No. 14,699

United States Court of Appeals

For the Ninth Circuit

JAMES L. KEEHN,

Appellant,

vs.

ALASKA INDUSTRIAL BOARD, BELLINGHAM CANNING CO. and D. K. MACDONALD & CO.,

Appellees.

Appeal from the District Court for the District of Alaska, First Division.

BRIEF OF APPELLEES BELLINGHAM CANNING CO. AND D. K. MacDONALD & CO.

FAULKNER, BANFIELD & BOOCHEVER,
Box 1121, Juneau, Alaska,
Attorneys for Appellees Bellingham Canning Co. and D. K. MacDonald & Co.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Statutes

Texts

No. 14,699

United States Court of Appeals
For the Ninth Circuit

JAMES L. KEEHN,
Appellant,

vs.

ALASKA INDUSTRIAL BOARD, BELLINGHAM CANNING CO. and D. K. MACDONALD & CO.,
Appellees.

Appeal from the District Court for the District of Alaska, First Division.

BRIEF OF APPELLEES BELLINGHAM CANNING CO. AND D. K. MacDONALD & CO.

FACTS.

James L. Keehn was employed by the Bellingham Canning Co. as a bull cook on or about August 6, 1952. No definite statement was made by Mr. Keehn as to any accidental injury arising out of and in the course of his employment. In his deposition he stated that he was engaged in placing mattresses on a bed and that one "Tiny" was in the next room and heard

him "holler". See Tr. 27. There was no statement as to what caused him to "holler", although a medical report set forth a history as given by Mr. Keehn to the neurological clinic as follows: "Patient states that he sustained injury to his back in August 1952 while employed as a marine engineer in Alaska. He says that he was bending over to pick up a weight and that he felt a popping sensation in the region of the low back." (Tr. 29.)

Prior to this alleged injury, Mr. Keehn had sustained a serious injury while in a different employment. This injury occurred on November 4, 1951, when his right leg was caught by sliplines aboard a vessel. The diagnosis of his condition after this 1951 injury gave as the first item: "Strain contracture ligaments low back past pelvis to legs as a result of the accident, causes restriction of motion and compression irritation of peripheral nerves passing through these ligaments resulting in peripheral motor and sensory nerve symptoms and signs particularly in right femoral and right sciatic distribution." (Tr. 28.)

Although Mr. Keehn denied any other back disability, on cross-examination he admitted that in 1949 while employed by the Kadak Fisheries a back pain "hit" him while he was lifting a piston and, as a result, he was hospitalized for three days and given electric diathermy treatments. (Tr. 26.)

Despite the questionable nature of the alleged injury while with the Bellingham Canning Co. and

despite the previous injuries to Mr. Keehn's back, he was paid temporary disability compensation by the compensation insurers of the Bellingham Canning Co. in the amount of $2,264.00. The company also paid all medical expenses, including hospital and doctors' bills, and furnished the employee with two operations consisting of a laminectomy and a fusion of his back, which medical bills were in the amount of $3,987.00. Upon his release by the attending physician, a compromise of Mr. Keehn's claim was made whereby Mr. Keehn received an additional $2,880.00, representing 40% permanent partial disability. The compromise and release was approved by the Alaska Industrial Board on June 25, 1953.

At the end of May of 1953, Mr. Keehn undertook employment as chief engineer aboard a vessel, and he was employed later aboard another vessel, which employment terminated September 15, 1953. At that time he underwent another operation on his back which was performed by the Public Health Service in Portland, Oregon. No herniation of the intervertebral disc was found and a new fusion was performed.

Application for Adjustment of Claim was filed with the Alaska Industrial Board on November 3, 1953, contending that Mr. Keehn was entitled to additional temporary disability compensation as a result of the operation. It was not contended that any further award should be made for permanent partial disability. The Alaska Industrial Board, by unanimous

decision, found that: "There was no showing that the aggravation caused by the second injury (the alleged injury of August 1952) exceeds forty per cent permanent partial disability for which compensation was paid under the Compromise and Release dated June 25, 1953 . . ." and denied the application. (Tr. 4.) From this decision applicant appealed to the United States District Court for the District of Alaska, contending in his complaint on appeal that he was entitled to be paid for additional temporary disability as a result of the last operation. The District Court affirmed the decision of the Alaska Industrial Board, holding that there was substantial evidence upon which such decision was based. This appeal has been taken from that decree of the United States District Court for the District of Alaska.

QUESTIONS PRESENTED.

As indicated by the summary of the evidence involved in this case, Mr. Keehn has had an involved history of injuries to his back. He sustained an injury to his back while lifting a piston in the employ of the Kadak Fisheries in 1949, and had a very serious injury in 1951, the first diagnosis of which involved classic symptoms of low back disability. The history as to any accidental injury arising out of employment with the Bellingham Canning Co. is of an exceedingly doubtful nature. This doubtful claim was settled by a compromise and release and Keehn was paid by the

insurers of Bellingham Canning Co. for temporary disability for the period from the date of his injury in August 1952 to May 31, 1953, in the amount of $2,264.00. He was also paid all medical expenses, including hospital and doctors' bills, totaling $3,987.00. The compromise and release provided further for the payment to him of the additional sum of $2,880.00, representing a 40% permanent partial disability. This compromise and release was approved by the Alaska Industrial Board.

After working approximately five months, Keehn had further back difficulties and sought to recover additional temporary disability payments from the appellees. The Alaska Industrial Board found that there was no showing of any disability attributable to the August 1952 injury in excess of the 40% permanent partial disability for which Mr. Keehn had been paid. Thus the first question presented by this appeal is whether there was any substantial evidence upon which the Alaska Industrial Board could conclude that any alleged change of condition of Mr. Keehn arising after the approval of the compromise and release was not attributable to the August 1952 alleged injury. Obviously, if the alleged change of condition was not attributable to the alleged August 1952 injury, Keehn would have no right to further compensation. In the event that this question should be decided in favor of Mr. Keehn, a second question would be presented as to whether, under the provisions of the Alaska Workmen's Compensation Act,

there is a right to further temporary disability payments after a compromise and release has been approved by the Alaska Industrial Board.

ARGUMENT.

I.

THERE WAS SUBSTANTIAL EVIDENCE UPON WHICH THE ALASKA INDUSTRIAL BOARD BASED ITS FINDING THAT THERE WAS NO SHOWING OF DISABILITY EXCEEDING 40% CAUSED BY THE ALLEGED INJURY OF AUGUST 20, 1952.

The Alaska Industrial Board found that the aggravation attributable to the incident of August 1952, the second injury as referred to in the Board's decision, did not exceed the 40% permanent partial disability for which applicant had been paid. This decision in effect states that there was no additional disability attributable to the incident of August 1952 after the compromise and release had been approved by the Alaska Industrial Board.

Section 43-3-22 ACLA 1949 provides in part: "An award by the full Board shall be conclusive and binding as to all questions of fact." The law in regard to appeals from a Board's findings is set forth in Larson's *Workmen's Compensation Law,* Vol. 2, Sec. 80.10, as follows:

> "A finding of fact based on no evidence is an error of law. Accordingly, in compensation law, as in all administrative law, an award may be reversed if not supported by any evidence. Conversely, since the compensation board has ex-

pressly been entrusted with the power to find the facts, its fact findings must be affirmed if supported by any evidence, even if the reviewing court thinks the evidence points the other way. This statement is, without any close competition, the number-one cliche of compensation law, and occurs in some form in the first paragraph of compensation opinions almost as a matter of course."

At Section 80.20 in his work, Larson goes on to state:

"The principal corollary of the 'substantial-evidence' rule is the proposition that the reviewing court will not itself weigh the evidence, nor substitute its judgment for that of the commission, even when it is convinced that the weight of the evidence is contrary to the commission's findings."

The burden of proof was on the applicant to show that there had been a change in his condition after the compromise and release had been approved, *which change in condition was attributable to the alleged injury of August 1952.* The Alaska Industrial Board, after reviewing all the evidence in this case, found that that burden of proof was not met. The learned judge of the United States District Court for the District of Alaska, after carefully reviewing all of the evidence, found that there was substantial evidence upon which the Board based its decision. Unless this honorable court should find that there was no evidence to justify the Board's finding, it is respectfully submitted that the decision below should be affirmed.

Appellant sustained a severe crushing injury to his left leg in 1942. In 1951 his right leg was caught by a slipline while he was working aboard a vessel, resulting in the following diagnosis: "Strain contracture ligaments low back past pelvis to legs as a result of the accident, causes restriction of motion and compression irritation of peripheral nerves passing through these ligaments resulting in peripheral motor and sensory nerve symptoms and signs particularly in right femoral and right sciatic distribution." (Tr. 28.) These symptoms as described after the 1951 injury are almost the classical symptoms for nerve root involvements of low back injury. See *Intervertebral Disc Injuries in Workmen's Compensation* by Larry Allen Bear, Vanderbilt Law Review, June 1953, page 883 at 885. Appellant had also had another back injury in 1949 while working for Kadak Fisheries.

There was no clear cut history of an accidental injury arising out of and in the course of the employment with Bellingham Canning Co. The testimony of the appellant failed to indicate what caused him to have pain. (See Tr. 27.) Appellant's statement to attending physicians was to the effect that when he bent over he felt a "popping" in his back. (See Tr. 29.) It is to be noted that this statement makes no mention of a lifting or twisting strain but merely alleges that there was a "popping" sensation when appellant bent over.

Despite this exceedingly doubtful history of any accidental injury causing an aggravation of a preexisting condition, the appellee company very gener-

ously paid Mr. Keehn full temporary disability compensation and took care of medical expenses involved in treating his back, although doubtlessly the cause of the disability antedated the August 1952 incident.

Thereafter, a compromise and release was entered into with Mr. Keehn whereby he was paid for 40% permanent partial disability. It is not contended that his permanent disability has exceeded that amount. The Alaska Act requires that, in cases of partial disability where the disability does not "come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity such employee by reason of the injury, bears to the earning capacity such employee would have had had he or she not been injured . . ." Sec. 43-3-1H ACLA 1949. It is to be noted that the employer is only required to pay for the portion of disability attributable to the injury arising out of and in the course of employment with that company. Under those circumstances and in view of the previous serious injuries and the exceedingly doubtful history of any injury while working for the appellee company, the payment for 40% permanent disability was most generous.

Commencing with May 31, 1953, Mr. Keehn resumed his regular employment aboard various vessels until September 15 when further back difficulty required

an additional operation. It must be admitted that the Alaska Industrial Board would probably have had the right to attribute the last operation to the minor incident of August 20, 1952, disregarding all of the past history of severe injuries sustained by the employee. The Board, however, certainly had ample evidence upon which it could determine that this last operation was unrelated to the minor back strain involved in lifting the mattresses and, accordingly, deny further compensation for that incident. There certainly is as much reason to believe that the back disability was caused either by applicant's work aboard vessels between May 31 and September 15, 1953, during which time he complained that pains occurred while climbing up and down ladders aboard the vessels; or was attributable to the severe injury of November 4, 1951 or to his injury of 1949 while working for the Kadak Fisheries, or a combination of those incidents. Since there are ample facts for the Board to have arrived at that conclusion, the decision of the Alaska Industrial Board denying further compensation should be affirmed.

> "That the disability or death for which compensation is claimed resulted from a compensable injury is an essential element of the claimant's case, and the burden rests upon the claimant, therefore, to prove such fact by competent evidence. The burden of showing that a pre-existing infirmity or diseased condition was aggravated by the injury complained of rests upon the claimant . . ." 58 Am.Jur. 859.

By stating that the aggravation caused by the second injury did not exceed 40% permanent partial disability, the Alaska Industrial Board clearly implied that no further temporary disability was attributable to the August 1952 incident. This finding of the Board to the effect that the additional disability was not attributable to the August 1952 incident involves a situation similar to that decided in *John H. Green's Case,* 165 N.E. 120, 266 Mass. 355, wherein the court held:

> "The fact that the present condition of the claimant might reasonably result from the injury, or that it was conceivable that this condition might so result, is not sufficient to justify the conclusion that the condition was causally related to the injury. A mere conjecture or surmise is not proof. There must be evidence to support the finding and the burden was upon the employee to prove his case."

The general requirement as to degree of proof for setting aside an approved compromised settlement based on alleged change of condition is set forth in Schneider's *Workmen's Compensation Text,* Vol. 8, page 638, as follows:

> " ' "While courts have been very generous as to the rules of evidence to establish causation when initial compensation depended on it, yet when that compensation has been paid and a final receipt given, the evidence to overthrow the latter must be of a more definite nature." It must be such as to make it certain to the trier of the fact that the factual backgrounds for revocation existed.'

"The evidence seeking to overthrow a receipt should be precise and credible; of a more definite and specific nature 'than that upon which initial compensation is based; the causation between the alleged disability and the accident must be established by more than simply the testimony of the employee and medical testimony based solely upon the employer's* own history of the case.' The purpose of the rule 'is to prevent the maintenance of false claims and to give some degree of assurance to an employer that his liability has been ended or will not be reestablished unless it is upon evidence which clearly warrants it.' But 'where one is under a mistaken belief that he has recovered sufficiently to return to work, such mistaken belief would not of itself warrant setting aside a final receipt.'" (*Should read "employee's.")

In the case of *Citizens Coal Mining Co. v. Industrial Commission,* 141 N.E. 434, 309 Ill. 473, an employee complained of pain in his back from pushing a car. At the hearing doctors testified that he suffered from an extension of bones of the back attributable to an old infection which had been going on for many years and that the injury was trivial, contributing in no way to the claimant's condition. The commission refused to enter an award for the employee and this decision was affirmed on appeal, based upon the fact that the disability was from a long standing condition causing gradual changes in the spine so that the alleged accident was neither an original or aggravating cause of the applicant's disability.

In *Rosenkranz v. Industrial Commission,* 262 P. 1014, 83 Colo. 123, the claimant was suffering from arthritis of the spine. Although there was evidence which, if believed, would have justified a finding that, in addition to the disease, there was a temporary disability caused by a sprain of the sacroiliac joint, the court held that there was no evidence which would compel such a finding and that the sprain caused by lifting could have been a trivial matter, not enough to cause disability in that the progress of the disease could have culminated when it did without the strain.

Thus, in the case of *Olson v. Department of Labor & Industries,* 26 P. 2d 313, 43 Wash. 2d 85, where an employee was paid temporary disability compensation under an award of the commissioner and later sought additional compensation for an aggravation of his condition, it was held:

> "An injured workman seeking compensation for aggravation of injury has the burden of showing aggravation of his condition by medical testimony."

Evidence was submitted in the *Olson* case showing that Olson's disability was worse than at the time that the award had been entered. It was held, however, that there was no showing that the aggravation was attributable to the injury for which the previous award was granted and, accordingly, the decision denying further compensation was affirmed.

Similarly, in the subject case, the Board was justified in finding that Keehn's last operation was not attributable to the August 20, 1952, incident.

In *Stowsand v. Jack Rabbit Lines,* 58 N.W. 2d 298, (Sup. Ct. S.D. 1953), an employee slipped and stumbled on May 13, 1949, causing a protruded intervertebral disc. The employee had had a previous fall in 1947 but was awarded compensation arising out of the 1949 injury. Subsequently the employee filed for further compensation, alleging "a recurrence of total and complete incapacity from working as a result of the injury." The court held:

> "The award of April 15, 1950, allowed compensation for temporary total disability for the period from June 13, 1949, to January 1, 1950, and was res judicata that claimant ceased to suffer a condition of compensable injury. The question here presented is whether claimant by the evidence submitted on review established as a conclusion of law that there was a subsequent disability connected with and attributable to the accidental injury, and not merely that such evidence would sustain a finding to that effect. We have said on other occasions that it is within the province of the Industrial Commissioner to determine the facts, that we do not weigh the evidence and that findings adverse to a claimant cannot be disturbed on appeal unless the record shows that he established the existence of facts by such a clear preponderance of the evidence that it was unreasonable to find to the contrary." (p. 299.)

It was further stated:

> "The evidence shows that claimant at the time of the original award was unable to work at her usual employment and was able to do only light

work. The testimony on review was substantially to the same effect but this is not decisive. Incapacity may result from a natural cause such as infirmity, disease, or other cause not attributable to the accident itself. In view of the holding of the Industrial Commissioner at the original hearing that claimant 'ceased to suffer a condition of compensable injury', the decisive question then was whether there was a recurrence of disability occasioned by the accidental injury. Whether the Industrial Commissioner could have found that there was a recurrence of disability we need not determine. We hold that the Industrial Commissioner upon consideration of all the evidence before him could reasonably conclude that there was no change of condition due to the accident and that the finding as to claimant's present disability is not as above indicated a reversal of the former finding of fact that she sustained a compensable injury." (pp. 300-301.)

In *Harris v. Industrial Commission,* 251 P. 2d 890, 75 Ariz. 71, an employee sustained a compression fracture of the fifth thoracic vertebra and a compound fracture of the distal ends of the left tibia and fibia. He was granted an award for temporary disability and permanent partial disability attributable to the partial loss of function of the left leg. Subsequently he had a fusion operation of his back and, for that reason, sought to have the award modified. The court refused to regard the new operation as a justification for reopening the award and upheld the commission's decision on the basis that there was no

change in his condition from the time of the initial award attributable to his injury of January 26, 1948.

In *Simmons v. Marshall,* 94 F. 2d 850, an employee was overcome by the strain of carrying a heavy grid weighing approximately 250 lbs. His employer paid him compensation for an extensive period of time for heart disability in connection with this incident. Subsequently the employee sought to reopen the case, alleging that he was totally disabled, but the commissioner found that the result of carrying this heavy grid was only a wrenching of the back and that the accident was not responsible for the cardiac trouble which admittedly totally disabled the employee. The plaintiff had testified to the performance of heavy work without symptoms of heart trouble prior to this incident. This honorable court upheld the finding of the commissioner, stating:

> "The findings of the commissioner are final where there is any evidence warranting inferences supporting them."

In *Santerli v. Rocky Mountain Fuel Co.,* 158 P. 2d 927, 113 Colo. 1441, an employee received an award for a back injury on the basis of "permanent disability equivalent to 5% as a working unit." Subsequently the employee sought to file a petition to reopen the award, alleging that he had a loss as a working unit equivalent to 10%. Medical evidence was introduced showing that he did have a 10% permanent partial disability. The court held:

> "Until there is competent testimony to show what per cent of the increased disability is due to the

> accident, the commission cannot 'ascertain in terms of percentage the extent of general permanent disability which the accident has caused.' . . ."

Accordingly, the Supreme Court of Colorado found that there was no basis for the commissioner's increasing the previous award. Certainly in the subject case where the Board itself has found that there was no increased or additional disability attributable to the injury of August 20, 1952, the decision should be sustained.

In *Erickson v. Globe Wrecking Co.,* 280 N.W. 866, 203 Minn. 261, an employee had wrenched his back while carrying a heavy timber. The court held:

> "On the question whether relator's disability was caused by the twisting jerk, there was a strict division of opinion . . ."

and concluded

> "The evidence, as is readily seen, lends support to many conclusions while it neither favors nor compels any particular result. In such a case, as has been frequently stated, the ruling of the industrial commission will not be disturbed where it is one of the conclusions at which it may reasonably arrive."

See also *Tudman v. American Ship Building Co.,* 170 F. 2d 842, 7 Cir.

It would appear clear from all the evidence in the subject case that the Alaska Industrial Board was justified in finding that appellant had received full

compensation for any aggravation of his back condition attributable to the August 1952 alleged injury and that the subsequent disability was unrelated to the August 20, 1952 incident.

II.

A COMPROMISE AND RELEASE APPROVED BY THE ALASKA INDUSTRIAL BOARD MAY NOT BE REOPENED TO PERMIT FURTHER COMPENSATION FOR ADDITIONAL TEMPORARY DISABILITY.

Aside from express statutory provisions, there is no reason why a compromise settlement of a compensation claim where authorized by the applicable workmen's compensation law should not have the same binding effect as the compromise of any other contractual right. The general rule under these circumstances is set forth in 15 C.J.S. 749 and 750 as follows:

> "Since, as heretofore stated supra § 23, the courts favor the compromise and settlement of disputed claims, and it is presumed that the parties making them have consulted their own interest, they are not lightly to be interfered with. Hence, in the absence of fraud, mistake, or other circumstances going to the validity of the agreement, as discussed infra §§ 31-39, a settlement voluntarily entered into cannot be repudiated by either party or set aside by the court; nor will a settlement be opened merely to inquire into the equities between the parties, or because one of the parties has become dissatisfied."

"A compromise settlement may not be set aside 'save upon proof of fraud, wilful misrepresentation of true material facts, and for other causes that affect the validity of contracts generally, otherwise legal and binding.' " Schneider's *Workmen's Compensation Text,* Vol. 8, page 635.

"A settlement of a claim for personal injury will not be annulled because the subsequent recovery of the injured person was not so rapid as he had expected. Newly discovered evidence is not ground for attacking a settlement in the absence of fraud or concealment by the other party thereto." 15 C.J.S., 751.

In the subject case there is no pleading of fraud or mistake such as could possibly warrant the setting aside of a compromise settlement. The only basis alleged for setting aside the compromise which had been approved by the Board is set forth in the complaint on appeal to the District Court as follows: "Such Decision and Award was erroneous as a matter of law in that the evidence conclusively shows that the plaintiff suffered an operation arising out of and in the course of his employment in September 1953 from which he has not yet recovered for which he is due to be paid temporary disability."

Quite obviously, in the absence of some particular statutory provision enlarging the common law basis for the setting aside or reopening of compromise settlements, the above quoted statement from appellant's complaint on appeal to the District Court does not present any valid claim for setting aside the compromise and release.

Nor are the cases cited by learned counsel for appellant of any avail as all of those cases depend on express statutes authorizing the compensation authorities to reopen compromise settlements based on a change in the condition of the employee.

As stated in 165 A.L.R. 9 at 36:

> "It would be unwarranted even to hazard a generalization upon the effect of a compromise previously entered into by the parties to bar jurisdiction to review at a later time. The answer to the question rests primarily on local statutes and local policies.
>
> "In some jurisdictions, there are decisions which have resulted in the conclusion that the making of a previous compromise settlement for injuries received in a compensation case does not bar jurisdiction to review the case at a later time, reviewing and reopening it, *where such review is sought upon grounds specified in the local review statute* and within the time limit, if any, specified therein." (Emphasis ours.)

In the absence of an express statutory provision authorizing the reopening of a claim after approval of a compromise settlement, it is generally held that the settlement is final. See *Dewey v. Union Electric Light & P. Co.,* 83 S.W. 2d 203 (Mo. App., 1935); *Elich v. Industrial Accident Board* (Mont. 1945), 154 P. 2d 793; *Commercial Casualty Ins. Co. v. Hilton,* 87 S.W. 2d 1081, 126 Tex. 497, rehearing denied 89 S.W. 2d 1116, 126 Tex. 505; *Hay v. Woosley,* 135 S.W. 2d 933, 175 Tenn. 475; *Willett v. State Industrial Commission,* 263 P. 664, 129 Okla. 101; *Tippin*

v. State Industrial Commission, 272 P. 848, 134 Okla. 179; *Indian Territory Illuminating Oil Co. v. Ray,* 5 P. 2d 383, 153 Okla. 163; *McCarthy's Case,* 115 N.E. 764, 228 Mass. 444; *Kinzer v. Wyandotte County Gas Co.,* 219 P. 278, 114 Kan. 440; *Brown v. Corn Products Ref. Co.,* 55 S.W. 2d 706, 227 M.A. 548; *State ex rel. Wors v. Hostetter,* 124 S.W. 2d 1072, 343 Mo. 945.

The Alaska Act provides for lump sum settlements. Under circumstances where a lump sum is paid in settlement of a claim, states which normally permit reopening of compromises frequently refuse to reopen a settlement. Thus in New Mexico the review statute permitted review by an employer only to reduce or terminate compensation which was being paid and the court intimated that the review statute had no application to lump sum payments. See *Hudson v. Herschbach Drilling Co.,* 128 P. 2d 1044, 46 N.M. 330. See also *Board of Education v. Industrial Commission,* 15 N.E. 2d 288, 368 Ill. 564; *Michelson v. Industrial Commission,* 31 N.E. 2d 940, 375 Ill. 462.

In *Integrity Mut. Casualty Co. v. Nelson,* 183 N.W. 837, 149 Minn. 337, the court refused to permit reopening of a lump sum settlement, stating:

> " '. . . and awards payable periodically for periods exceeding six months, and the lump-sum settlement is there made final, while relief from an award exceeding six months' disability payable periodically is open to readjustment on the grounds therein specified . . . The statute seems quite clear in expression and purpose and will

admit of but one construction, and that to the effect that the law-making body intended the particular settlement to end finally matters so adjusted. The finality feature was no doubt made a part of the statute in encouragement of settlements in the expectation that payment of compensation would promptly reach the injured workman, and the delay usually incident to the litigated controversy be thus avoided. . . . The question requires no further discussion. It was within the power of the legislature to make such settlements final, and the courts are without authority, inherent or otherwise, to nullify the legislative declaration to that effect, except for fraud or deception of a character to entitle the complaining party to relief . . .' "

To the same effect is *Bailey v. U.S.F. & G. Co.,* 155 N.W. 237, 99 Neb. 109, and *Southern Surety Co. v. Parmely,* 236 N.W. 178, 121 Neb. 146.

The appropriate Alaska statutes must be examined in the light of the principles set forth above in order to ascertain whether a compromise and release approved by the Alaska Industrial Board may be set aside in the event that the employee has additional temporary disability after receipt of the lump sum payment. In the absence of statutory authority to that effect, the settlement must be regarded as final.

Section 43-3-6 ACLA 1949 specifies, insofar as applicable here:

". . . the employer and the employee or the beneficiary or beneficiaries, as the case may be, shall have the right to reach an agreement in regard

> to any claim for injury or death hereunder in accordance with the schedule hereof, but a memorandum of the agreement, in a form prescribed by the Industrial Board, shall be filed with the Board, otherwise the same shall be void for any purpose. If approved by the Board, such agreement shall be enforceable the same as any order or award of the Board, *and subject only to modification in accordance with the provisions of* Section 4 hereof." (Sec. 43-3-4.) (Emphasis ours.)

The Alaska Industrial Board is authorized to make rules for carrying out the procedure under the Act by virtue of Section 43-3-14 ACLA 1949, and has promulgated Article 17(a) of its Rules of Practice & Procedure in Disputed Claims which states as follows:

> "Agreements which provide for the payment of less than the full amount of compensation due or to become due, and which undertake to release the employer from all future liability, will be approved only where it appears that a reasonable doubt exists as to the rights of the parties or that approval would be for the best interest of the parties."

In the subject case, the Alaska Industrial Board approved the compromise and release which provided: "Upon approval of this Compromise agreement by the Alaska Industrial Board and payment in accordance with the provisions thereof, said applicant *releases and forever discharges said employer and insurance carrier from all claims and cause of action*

in the premises, subject only to the provisions of Sec. 4 of the Act." (Emphasis ours.)

Accordingly, unless Section 4 of the Act permits the reopening of a claim for further temporary disability payments after the approval of the compromise and release, it is clear that the payment of the lump sum under the release terminated appellees' liability.

Section 4 specifies:

> "If an injured employee (is) entitled to compensation under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or was entitled to a *higher rate of compensation* under same or some other part or subdivision of this schedule, then and in that event he or she shall receive *such higher rate,* after first deducting the amount that has already been paid him or her. *To that end* the Industrial Board is hereby given and granted continuing jurisdiction of every claim, and said Board may, at any time and upon its own motion or on application, review any agreement, award, decision or order, and on such review, may make an order or award ending, diminishing or increasing the compensation previously awarded, ordered, or agreed to, subject to the maximum or minimum provided in this Act . . ." (Emphasis ours.)

Section 4 applies both to awards and to agreements. It is to be noted that the authorization for the Board's continuing jurisdiction is limited to the power to provide for a higher rate of compensation if it is determined that the employee is entitled to such higher

rate. The statute makes no mention of providing for additional compensation in the event of a change of condition on the part of the employee after entry of an award or after approval of a compromise and release. It is to be admitted that most statutes providing for continuing jurisdiction of industrial boards specify the right under certain circumstances to reopen claims where there has been a change in the employee's condition. The Alaska Act, however, possibly due to its lump sum requirements in case of permanent disability rather than installment payments as provided in most acts, does not authorize continuing jurisdiction of claims where there has been a change of condition after final award or approved agreement. The continuing jurisdiction provision of the Alaska Act would thus apply to approved compromises in two different situations:

(1) Where an award is made for temporary disability and the rate established for average daily payments is in error. Thus if in a specific case a settlement were entered into on the basis that employee's average daily wages were $5 and it later could be established that the average daily wages during the period of disability would have been $10.00, the approved settlement could be modified accordingly.

(2) If the Board determined that an employee had a certain percentage of permanent disability, for example 10%, and it should afterwards develop that he "is or was" disabled to the extent of 20%, the settlement might be reopened and the additional

amount awarded since a higher rate of compensation would be involved.

It is to be noted that, in the subject case, applicant initially sought to increase his rate of temporary disability payments from an average daily wage basis of $8 to $10.00. This is the type of situation under which the Board is empowered to exercise continuing jurisdiction. Apparently, however, that point of the appellant was abandoned as no mention was made of it on the appeal to the District Court or in the Statement of Points Relied Upon herein.

The request made by the applicant to reopen the award for additional temporary disability payments could not have been granted by the Board, had it so desired, since it is beyond the Board's authority to reopen a claim after approval of a compromise and release where the question presented did not involve the *rate* of compensation. Appellant is not seeking a *higher rate* of compensation in this proceeding, but is endeavoring to secure additional compensation after his compromise agreement finally settling his claim.

Moreover, it is to be noted that, in the subject case, there was a very substantial question as to whether appellant had sustained any accidental injury arising out of and in the course of his employment with the defendant Bellingham Canning Co., and another substantial question as to whether any or all of the 40% disability was attributable to the minor incident of August 1952. It is certainly to the employer's and

insurance company's credit that they voluntarily made the payment for temporary disability and medical expenses and entered into the agreement to pay the full amount for 40% disability. The appellees thus, in effect, waived the right to contest questions pertaining to whether the employee sustained an accidental injury as required by the Alaska Act and, if so, as to the percentage of disability attributable to such injury. Before seeking to reopen this settlement, the employee should have made tender of the amount received under the compromise and release. Quite obviously the principal incentive for an employer to afford such generous treatment is to avoid the expenses and harassment of future claims arising out of the same incident. The employer should not be exposed to such a renewed claim without first receiving back the amount he paid in order to settle the doubtful liability.

> "It is a general rule, subject to the exceptions stated infra (2) of this subdivision that where a party to a compromise desires to set aside or avoid the same and to be remitted to his original rights, he must, in the absence of sufficient excuse, place the other party in statu quo by returning or tendering the return of whatever benefit or consideration has been received by him under such compromise, . . ." 15 C.J.S. 763.

This honorable court has ruled on this question in the Alaskan case of *Price v. Connors,* 146 F. 503, wherein it was stated:

> "In the present case the jury might have found that the whole of the damage suffered by the

> plaintiff did not, in fact, amount to $500 — the amount the defendants paid the plaintiff in settlement. And since the defendants put in issue all of the allegations of the complaint, it might, if the evidence justified it, have been found by the jury that the plaintiff was not entitled to recover at all. Yet the court below ruled that it was not necessary that the plaintiff should have repaid or tendered the money received by him, as a condition precedent to avoiding the release. That such is not the law upon such a state of facts was distinctly held by this court in the case of *Hill v. Northern Pacific Railway Company,* 113 Fed. 914, 51 C.C.A. 544.
>
> "The judgment is reversed, and cause remanded to the court below for a new trial."

Following this decision in *Price v. Connors,* the District Court for the Territory of Alaska has held that an employee could not seek additional compensation after receiving payment under a compromise agreement without first tendering back the money received for settlement of the disputed claim. *Beckoff v. Dan Creek Mining Co.,* 6 Alaska 218. Although this case was decided under an earlier Alaskan compensation law, there appears to be no reason why the decision should not be applicable under the present law. Appellant in the subject case seeks to "have his cake and eat it, too." He succeeded in securing a very favorable settlement for release of a doubtful claim and, after receipt of a large sum of money, wishes to reopen the claim without first restoring the money he received from the appellee.

CONCLUSION.

In view of appellant's serious back injury of 1951 and his back injury of 1949, the Alaska Industrial Board had ample basis for its finding that the subsequent alleged aggravation of August 1952 while in the employ of Bellingham Canning Co. did not exceed the amount for which compensation had previously been paid, and there was substantial evidence that any additional disability was not related to that minor incident. No tender was made of the amount paid in settlement of this doubtful claim before appellant brought this proceeding to set aside the compromise and release. Moreover, there have been no grounds stated for setting aside a valid compromise and release approved by the Alaska Industrial Board, since the Alaska continuing jurisdiction statute only provides for cases where an alteration in the rate of compensation is involved. Accordingly, it is respectfully submitted that the decision of the Alaska Industrial Board and the learned judge of the United States District Court should be affirmed.

Dated: Juneau, Alaska,
April 12, 1955.

FAULKNER, BANFIELD & BOOCHEVER,
By R. BOOCHEVER,
Attorneys for Appellees Bellingham Canning Co. and D. K. MacDonald & Co.